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Supreme Court of the United States

October Term, 1957
No. 758

HOLLYWOOD CIRCLE, INC., a Corporation,
Petitioner and Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California; RUSSELL S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California; PHILIP E. DAVIS, Area Administrator, Department of Alcoholic Beverage Control of the State of California; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California,
Defendants and Respondents.

RESPONDENTS' OPPOSING BRIEF

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RESPONDENTS' OPPOSING BRIEF

Jurisdiction

A. Opinion Below

Petitioner seeks a review of a final decision of the District Court of Appeal of the State of California, Second Appellate District, Division One, which affirmed a judgment of the Superior Court of the State of California, in and for the County of Los Angeles. The decision is reported in 153 Advance California Appellate Reports 576, 314 P. 2d 1007.

B. Absence of Grounds of Jurisdiction

The District Court of Appeal construed the provisions of Section 23081, of the California Business and Professions Code and determined that the time limits for filing notices of appeal in all legal proceedings must be complied with exactly as a jurisdictional prerequisite, and that this rule of procedural law applied to appeals to administrative tribunals as well as appeals to reviewing courts. Respondents submit that this decision does not affect the legal rights of petitioner arising under the due process clause or the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States, nor does this decision conflict with decisions in other cases.

Laws Involved

Section 22 of Article XX of the California Constitution and the applicable provisions of the California Government Code and the California Business and Professions Code are set forth in the petition at pages 7 to 25 of the Appendix.

For illustrative purposes respondents here recite the provisions of Section 23081 of the California Business and Professions Code:

> "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a final decision of the department may appeal to the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal."

Issues Involved

This case concerns the appellate procedure in a review of a decision of the California administrative agency charged with enforcing the liquor laws of California. The issue was succinctly posed by the District Court of Appeal in its decision in the following words:

> "Does the same strict rule that requires a notice of appeal to be filed within the time specified by law apply to an appeal to an appeal board of an administrative agency?"

A subordinate question is whether an appellant who fails to perfect his appeal can complain that his appeal was dismissed and not heard on the merits.

The District Court of Appeal in its decision disposed of these issues by holding:

> "The general policy of our law is not unfavorable to judicial review of administrative proceedings. But it is the policy of our law that time limits for filing notices of appeal in all legal proceedings must be complied with literally and exactly. This is generally held to be a jurisdictional prerequisite. (*Cf., Estate of Hanley*, 23 Cal. 2d 120 [142 P. 2d 423, 149 A. L. R. 1250], 3 Cal. Jur. 2d 653.)
>
> "This court can see no reason why appeals in administrative tribunals should be governed by any other rule.
>
> "Therefore, in this case, the administrative appeal was filed too late, the Appeals Board correctly held that it had no further jurisdiction over it, the department's decision became final, and the courts have no jurisdiction to review the proceeding."

Statement of the Case

The respondent Department of Alcoholic Beverage Control, hereinafter referred to as "Department," is the administrative agency empowered under the provisions of Section 22 of Article XX of the Constitution of the State of California to license the manufacture, importation and sale of alcoholic beverages in California and to deny, suspend or revoke any specific liquor license if the Department determines for good cause that the granting or continuance of such license would be contrary to public welfare and morals. The Legislature of California has provided in the Alcoholic Beverage Control Act (Secs. 23000 to 25762 of the California Business and Professions Code) that these constitutional duties exercised by the Department may be reviewed through administrative proceedings, followed by an administrative appeal and then resort to the courts. A decision of the Department following an administrative hearing is first reviewable by the Alcoholic Beverage Control Appeals Board, hereinafter referred to as "Appeals Board" which is the administrative appellate body designated in Section 22 of Article XX of the California Constitution as the tribunal from which aggrieved liquor licensees must seek relief before applying to the superior court for judicial review through an application for the issuance of a writ of mandate. A licensee aggrieved by a decision of the Department invokes the jurisdiction of the Appeals Board through filing an appeal to that body pursuant to the provisions of Section 23081 of the California Business and Professions Code. This section provides that an appeal to the Appeals Board may be taken by an aggrieved person within 40 days after the decision of the Department

is delivered or mailed to the parties to the administrative proceeding before the Department.

In the case at bar an accusation was filed with the Department charging petitioner with allowing its premises to be used as a place to which persons resorted for purposes contrary to public welfare and morals, particularly as a place in which persons met, engaged in, or solicited lewd or lascivious homosexual acts. [Clk. Tr. p. 45.] A hearing on the accusation was held before a hearing officer who found seven separate instances where men on petitioner's premises solicited acts of homosexual intercourse with police officers, one of which instances included the touching of the police officer's private parts. The hearing officer in his proposed decision found that grounds existed under the provisions of the Alcoholic Beverage Control Act to suspend or revoke petitioner's liquor license, and recommended as a penalty that the license be revoked. [Clk. Tr. p. 3.]

Petitioner filed a petition for reconsideration, which was denied by the Department on April 20, 1956, and notice of this denial was received by petitioner on May 2, 1956. [Clk. Tr. p. 5.]

On May 3, 1956, 41 days after March 23, 1956, the day on which the Department mailed its decision, petitioner mailed its notice of appeal to the Appeals Board. This notice was received and filed by the Appeals Board on May 7, 1956 [Clk. Tr. pp. 5, 20], a total of 45 days after the Department mailed petitioner the decision revoking its liquor license. [Clk. Tr. p. 13.] The Department moved to dismiss the appeal upon the ground that it was filed beyond the forty-day statutory period in which appeals could be filed and the Appeals Board was with-

out jurisdiction to consider the appeal. [Clk. Tr. p. 6, 20.] The motion was granted and the appeal was dismissed. [Clk. Tr. pp. 20-21.]

Petitioner then filed in the Superior Court a petition for a writ of mandate directing the Department and the Appeals Board to reverse their decisions. [Clk. Tr. pp. 1-9.] Respondents filed a general demurrer to the petition for writ of mandate [Clk. Tr. pp. 11-19], and the demurrer was sustained without leave to amend. [Clk. Tr. p. 22.] Judgment was rendered in favor of respondents. [Clk. Tr. pp. 23-24.]

Petitioner next filed an appeal with the District Court of Appeal of California and on September 3, 1957, the court rendered its decision affirming the judgment of the Superior Court. On September 25, 1957, the District Court of Appeal denied a rehearing.

Petitioner applied to the Supreme Court of California for a hearing and the application was denied on October 30, 1957. The minutes of that court set forth in 49 Advance California Reports (Min. p. 3) indicate that only one justice of the seven voted for a hearing; there was no "split decision" as alleged by petitioner at page 2 of the petition for writ of certiorari herein.

ARGUMENT

I.

There is No Federal Question Here Involved

It has been firmly established in California that when an administrative remedy is provided by law relief must first be sought from the administrative body, and this remedy must be exhausted before the courts will act.

Lynn v. Duckel, 46 Cal. 2d 845;

Temescal Water Co. v. Dept. of Public Works, 44 Cal. 2d 90;

Abelleira v. District Court of Appeal, 17 Cal. 2d 280.

In the case of *Fiscus v. Dept. of Alcoholic Beverage Control,* 155 Advance California Appellate Reports 271, it was held that the rule of exhaustion of administrative remedies applied to appeals from the Department to the Appeals Board. In the case of *Van De Veer v. Department of Alcoholic Beverage Control,* 155 Advance California Appellate Reports 933, the court below reaffirmed its decision in the case at bar and again held that failure to perfect the administrative appeal within the forty-day period required by law was fatal to the appeal and divested the Appeals Board of jurisdiction in the matter. In its opinion (at p. 937) the District Court of Appeal succinctly analyzed the legal effect of the provisions of Section 23081 of the California Business and Professions Code upon those aggrieved litigants who desired to appeal.

The statement of the court, which totally refutes all contentions of the petitioner, is the following:

> "The Legislature, under the constitutional provisions heretofore related, has the power to impose such limitations as it desires. The Legislature has acted

and has provided (1) the appeal must be in writing; (2) the appeal must state the grounds upon which the review is sought; (3) a copy of the appeal must be mailed to each party including the Department, and (4) the appeal must be taken within 40 days after the Department's decision is delivered or mailed to the parties (Bus. & Prof. Code, §23081), and the appeal must be determined only on the record and on briefs filed by the parties, who have the right to present oral argument (Bus. & Prof. Code, §23083). In adopting the law as now written, the Legislature very properly provided that the time for filing an appeal begins to run upon the commencement of an official act by an agency of the state, namely when the Department either mails out its decision or personally serves it on the party concerned, thereby placing it beyond the control of some licensees to delay and delay by claiming they never received the notice, or claiming they received it later than it was actually received, and thereby placing the burden upon the Appeals Board to determine on each occasion just when, if ever, such a notice was received. If the present law is too severe, and we do not mean to imply that it is, it is the province of the legislature to change it and it is not our right to do so by judicial decree."

Respondents submit that this interpretation of the duties imposed upon parties to a state administrative proceeding does not warrant review by this Honorable Court on certiorari since the interpretation is reasonable and just and does not conflict with any Federal law.

The contention of petitioner that its appeal to the Department for reconsideration of the original decision extended or affected its time for filing an appeal to the Appeals Board is also entirely without merit and presents

no Federal question. The court below disposed of the argument by stating that the proceedings for reconsideration did not affect the time for filing notice of appeal since the decision from which the appeal must be filed is the original decision of the Department. This holding conforms with the provisions of Section 11521a of the Government Code covering reconsiderations by administrative bodies in California, for a reading of that statute makes it clear that a new decision of the administrative agency arises only in those instances when reconsideration has been granted and the case is heard anew. The granting of reconsideration obviously sets aside the original decision, but whenever reconsideration is denied, as in the case at bar, the original decision stands.

Petitioner as one who omitted to follow the constitutional and statutory provisions covering a review of the quasi-judicial decisions of a statewide administrative agency has no standing before this Honorable Court in seeking relief from its own fault.

II.

California Follows the Rule of the Federal Courts Requiring a Timely Appeal

The attention of this Honorable Court is directed to a series of cases holding that the timely filing of a notice of appeal is a jurisdictional requirement in tax cases. Section 6213(a) of the 1954 Internal Revenue Code (26 U. S. C. A. §6213) similar in form and content to its predecessor sections provides as follows:

> "Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in Section 6212 is mailed (not

counting Saturday, Sunday or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . ."

In interpreting this provision of law the United States Court of Appeals has consistently held that unless the taxpayer officially files his appeal to the reviewing tribunal within the statutory period, the appeal must be dismissed upon a jurisdictional basis. In the case of *Lewis-Hall Iron Works v. Blair,* 23 F. 2d 972, 974 (writ of certiorari denied by this Honorable Court, 277 U. S. 592; 48 Sup. Ct. 529; 72 L. Ed. 1004), the taxpayer seeking redetermination dispatched by special delivery to the Board of Tax Appeals a petition which was deposited by a post officer messenger in the mail slot of the Board two hours and forty minutes after its official closing time on the last day of the statutory period in which to file an appeal. The petition was found the next morning and stamped as of that date. In its opinion upholding the Board's dismissal of the petition the court states:

"'The controlling question at present is whether this deposit of the petition constituted a filing of it within the law. This question must be answered in the negative, for it is well established that in general a paper is not "filed", within contemplation of law, until it is delivered to the proper officer to be filed by him.

"'A paper is said also to be filed when it is delivered to the proper officer, and by him received to be kept on file. 13 Vin. Abr. 211; 1 Littleton 113; 1 Hawk. Pl. Cr. 7, 207. . . . Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the

duty, and the making of the proper indorsement by the officer. Stone v. Crow, 2 S. D. 525, 51 N. W. 335. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; People v. Peck, 67 Hun, 560, 22 N. Y. S. 576' 2 Bouv. Law Dict. 1219, 'File'."

In the case of *Poynor v. Commissioner of Internal Revenue,* 81 F. 2d 521, petitions for redetermination were sent within the 90-day statutory period from Fort Worth, Texas, by registered mail but did not arrive until the 92nd day after the deficiency notice had been mailed by the Commissioner. Evidence was introduced at the hearing on the motions to dismiss showing that under scheduled air mail service the petitions would have been delivered to the Board of Tax Appeals on the 90th day and that the delay was due to adverse weather conditions. The court held the filing was not timely and stated that a paper is filed when it is delivered to the proper official and received by him to be kept on file. The court determined that the depositing of a paper in the post office within time under the usual course of mail for it to reach the Board within the time allowed is not a filing of the paper with the Board, citing *United States v. Lombardo*, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897. The case of *Louisiana Discount Corporation v. Commissioner of Internal Revenue*, 193 F. 2d 495, was decided under the authority of *Poynor v. Commissioner of Internal Revenue, supra.*

In the case of *Stebbins' Estate v. Helvering,* 121 F. 2d 892, the taxpayer on the 89th day took two steps: he sent a telegram to the Board of Tax Appeals stating that the formal petition requesting determination was being forwarded that day, and he sent the formal petition to the Board by air mail. Because of unfavorable weather conditions, however, the mail was transferred from plane to railroad, and the petition was not received by the Board until the 91st day. The Board held that the telegram was not a petition and dismissed the appeal as being untimely. The United States Court of Appeals for the District of Columbia citing the cases of *Lewis-Hall Iron Works v. Blair, supra,* and *Poynor v. Commissioner of Internal Revenue, supra,* upheld the dismissal upon the basis that the requirement for the filing of an appeal during the statutory period was jurisdictional and could not be set aside on equitable grounds.

Similar is the case of *Di Prospero v. Commissioner of Internal Revenue,* 176 F. 2d 76, wherein the petition for redetermination of the deficiency was sent to the Tax Court by air mail, special delivery, from San Francisco. The petition arrived in Washington, D. C., at 2:45 P. M. on the 90th day from the date of mailing of the notice of tax deficiency, and the messenger bearing the petition arrived at the Tax Court after its normal closing hour of 5:15 P. M. The petition was returned to the post office and delivered the following, or 91st day. The Tax Court dismissed the petition for lack of jurisdiction, and was affirmed by the Court of Appeals (9th Cir.), which held that the Tax Court could require the filing of documents during business hours and the taxpayer's failure to file his appeal within the 90-day period precluded consideration of the petition. In similar vein is the case of

Kiker v. Commissioner of Internal Revenue, 218 F. 2d 389, wherein the taxpayer mailed the petition within time for it to arrive at the Tax Court on the 90th day, but because of wrong zone number on the envelope the petition was not received by the Tax Court until the 91st day. The court held this filing to be untimely.

These Federal cases holding that the timely filing of a notice of appeal was a jurisdictional prerequisite to the perfection of a valid appeal were cited in the case of *Van De Veer v. Dept. of Alcoholic Beverage Control, supra*, which reaffirmed the decision in the case at bar. Respondents submit that under Federal and California law it is now established that the failure of a litigant to file an appeal within the required time divests the appellate body of jurisdiction to consider the merits of the case. Thus, when the motion of the Department to dismiss petitioner's appeal was granted by the Appeals Board there was no longer any legal obligation upon the Department to prepare a transcript since there was in fact no appeal in existence to be considered by the Appeals Board.

The petition for writ of certiorari reveals upon its face that petitioner did not exhaust its administrative remedy because of its own lack of diligence. This failure of the petitioner placed it beyond the assistance of the reviewing body for, as stated in the case of *Dolezilek v. Commissioner of Internal Revenue*, 212 F. 2d 458:

> ". . . . One who seeks to avail himself of a special statutory remedy must comply with the conditions and time limits prescribed by the statute."

Conclusion

Respondents respectfully submit that the petitioner has failed to present a substantial federal question requiring this Honorable Court to exercise its jurisdiction in the matter. Upon the record and for the reasons hereinabove stated, respondents respectfully request that the petition for writ of certiorari be denied.

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